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92-483
No.

Supreme Court, U.S.
FILED
SEP 16 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States
OCTOBER TERM, 1992

JULIA McCAIN LAMPKIN ASAM, Ph.D.,J.D.

Plaintiff/Appellant/Petitioner

v.

CITY OF TUSCALOOSA, ET AL.

Defendants/Appellees/Respondants

PETITION FOR WRIT FOR CERTIORARI FROM SUPREME COURT OF ALABAMA AND ALABAMA COURT OF CIVIL APPEALS

ORAL ARGUMENT REQUESTED

Julia McCain Lampkin Asam, PRO SE
P.O. Box 591
Northport, Alabama 35476
205 333-1999

QUESTIONS PRESENTED FOR REVIEW

I. Whether the highest State Court, The Supreme Court of Alabama, can ignore the Constitutional issues of the instant case which consists of the violation of Julia McCain Lampkin-Asam's constitutional rights of equal protection, substantive due process, the grandfather clause which is known as prior non-conforming uses, and procedural due process that triggered in the §1983 claims by denying the Writ of Certiorari from the Alabama Court of Civil Appeals when the instant case is a zoning and rezoning case [rezoning was ignored by the Alabama Court of Civil Appeals], when the Alabama Courts failed to follow their own procedural law, Rule 56, Alabama Rules of Civil Procedure, when said building on the property which was zoned by mistake residential, has been commercial and a multi-dwelling for over fifty (50) years when at the same time the municipal city, City of Tuscaloosa,was authorizing

in the same residential zoning (R3) the selling of cars and trucks within 30 feet by selectively issuing a business license to sell cars and trucks? [There are a number of sub-issues involving the merits of the instant case, and the state issues concerning the Board of Adjustment who failed to follow their own city ordinance law as to changing from one type of prior non-conforming use to another when the grandfather issue should have been recognized], i.e. Whether the Petitioner's 5th and 14th Amendments rights under the U.S. Constitution were violated when the Honorable state courts failed to consider the constitutional issues in particular the grandfather clause [prior non-conforming uses], when the City of Tuscaloosa allowed the selling of cars and trucks across the street but did not allow Dr. Asam to practice law in her building which had been commercial and a multi-dwelling for over 50 years when the state courts ignored their own procedure laws [Rule 56, Alabama Rules of Civil

procedure,]and the Honorable trial court considered an untimely administrative procedural rule of the City which was not mentioned by the City of Tuscaloosa until the jury trial was about to proceed to closing arguments and the last minute directed verdict was wrongfully made by the trial court when a jury should have decided the grandfather issue?

PARTIES TO THE PROCEEDING

Julia McCain Lampkin Asam, Ph.D.,J.D., Pro se, [Plaintiff/Appellant/Petitioner], and the following respondants, City of Tuscaloosa, Mayor Al DuPont, and attorney, Robert Ennis, and agent, Board of Adjustment, and City Council of the City of Tuscaloosa.

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No.

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PETITIONER FOR WRIT FOR CERTIORARI FROM SUPREME COURT OF ALABAMA AND ALABAMA COURT OF CIVIL APPEALS

OPINIONS BELOW

The Petitioner/Appellant incorporates all of the statements in the Opinions below, and are stated in the Appendix of this Writ of Certiorari and incorporated as "Opinions below". Opinion of Alabama Court of Civil Appeals is dated February 21, 1992, and the Rehearing was denied on March 20, 1992; the

Writ of Certiorari to the Supreme Court of Alabama was denied on June 19, 1992, and the Rehearing was denied on September 10, 1992. [See Appendix for Opinion].

JURISDICTION

The Judgment of the Supreme Court of Alabama, of which review and reversal are sought, has jurisdiction under title 28, United States Code, Section 1257 (3).

Constitutional Provisions involved are:

Amendment XIV of the Constitution of the United States provides, in part, as follows:

"... no state shall make or enforce any law which shall... deprive any person of ... property without due process of law..."; nor deny to any person within its jurisdiction the equal protection of the laws."

Also, jurisdiction of this Court is invoked under U.S. Constitution, Amendment V, "no person shall ... be deprived of life, liberty or property, without due process of law;"

STATEMENT OF THE CASE

The instant case is now whether Julia McCain Lampkin Asam's constitutional rights under the 5th and 14th amendments to the U.S. Constitution have been violated by state alleged procedural rules [Rule 56, Alabama Rules of Civil Procedure, which was ignored since the Alabama Court of Civil Appeals failed to consider the rezoning issues that were before the lower trial court, and ignored any response to the administrative procedural rule that was untimely mentioned when closing arguments were about to be made, and the said administrative procedural rule was used to rule the case out on directed verdict instead of allowing the jury to decide the grandfather issue.

The Plaintiff/Appellant/Petitioner incorporates all of the Statement of the case in the appellate case below which will be stated in more detail if the Writ of Certiorari is granted and a Merits brief is allowed. The point is whether Dr. Asam has received due process in

the courts which is a violation of her 5th and 14th Amendments to the U.S. Constitution, and triggers in the 42 U.S.C. § 1983 civil rights claims.

The Appellees clearly waived any alleged administrative procedural violation by not timely mentioning the administrative rule when in fact Dr. Asam had timely filed the grandfather issue by amendment on the City level, since this instant case is a zoning and rezoning case.

As a general rule, affirmative defense is waived if it is not timely pleaded. Rules Civ. Proc. Rule 8. See Blase v. Blase, Ala. Civ. App. 419 So. 2d 599 at 600 (1982).

STATEMENT OF THE FACTS

This is a zoning and rezoning case.

The Honorable Alabama Court of Civil Appeals has failed to follow own law on summary judgment

by ignoring the rezoning part of the instant case below when the City of Tuscaloosa was a party defendant and the partial summary judgment on the constitutional issues of equal protection, substantive due process, grandfather clause [prior non-conforming uses] and procedural due process triggering in the § 1983 claims were also grossly ignored by the Honorable Alabama Court of Civil Appeals, [See Appendix for opinion], when the rezoning from R3 to BN was before the City Council of the City of Tuscaloosa, who also authorized in R3 zoning, a City of Tuscaloosa licensed to sell cars and trucks across the street [about 30 feet].

The bottom line is the alleged misinterpretation of procedural rules concerning summary judgment which the Plaintiff/Appellant/Petitioner did truthfully meet, is impinging on the civil rights [42 U.S.c. § 1983 claims of Dr. Asam when there were clear violations of her equal protection rights with the allowance of "spot zoning" across

the street of selling cars and trucks when said owner across the street was a man that the City of Tuscaloosa issued a business license to sell cars and trucks selectively with the same zoning of R3, instead of BN,i.e. gender discrimination.

The Plaintiff/Appellant/Petitioner incorporates all the facts below but has limited this Writ of Certiorari mainly to the constitutional issues. In the Merits brief, if Writ of Certiorari is granted, extensive facts will be presented to also include the state issues. However, the bottom line is that the City of Tuscaloosa did show gender discrimination by allowing the man to sell cars and trucks in R3 zoning with no grandfather issue, but the City of Tuscaloosa did not allow Dr. Asam to practice law across the street when her building was commercial and multi-dwelling for over 50 years and was zoned R3 by mistake.

REASON FOR GRANTING WRIT OF CERTIORARI

See Swendsen v. Gross, 530 So. 2d 764 (Ala. 1988) at 765, states,

"Mere general denial of liability, without more does not entitle movant to summary judgment as matter of law. Rules Civ. Proc., Rule 56.

The Supreme Court of Alabama failed to follow own law concerning affirmative defenses. See International Longshoremen's Association v. Davis, 470 So. 2d 1215 (Ala. 1985), International Longshoremen's Association v. Davis, 476 U.S. 280, 90 L. Ed. 2d 389, 106 S. Ct 1904 (1986). Also see Blase v. Blase, Ala. Civ. App., 419 So. 2d 599 at 600 (1982).

The fact the City of Tuscaloosa did not timely state any alleged affirmative defense concerning administrative procedural rules before the time of the closing arguments is clearing not following the International Longshoremen's Associations case cited above.

JURISDICTION IS NOT

DISCRETIONARY, AND SUMMARY JUDGMENT IS NOT DISCRETIONARY. See Hightower & Co., U.S. Fidelity & Guar. 527 So. 2d 698 at 699 Ala. 1988), which states,

"Granting Summary judgment is non-discretionary function of trial court and no presumption of correctness attaches to such decision upon appellate review. Rules Civ. Proc., Rule 56 (c)."

See Jones v. Alabama State Docks, 443 So. 2d 902 at 903, (Ala. 1983), which states,

"Due process clause of State Constitution secures every citizen against arbitrary action of those in authority and places him or her within protection of law of the land. Const § 13.

See Owens v. Okure, 57 LW 4065, which states,

"...We explained that the Civil Rights Acts provided: "[a] unique remedy making

it appropriate to accord the statute a sweep as broad as its language.' Because of the § 1983 remedy is one that can 'override certain kinds of state law.' "Monroe v. Pape, 365 U.S. 167, 173, (1961), and is, in all events, 'supplementary to any remedy any State might have..."

See Standard Oil Co. V. Graves, Wash. 1919, 49 S. Ct 320, 249 U.S. 389, 63 L. Ed. 662, which states,

"While the Supreme Court follows the decision of the highest state court as to the meaning of a state statute which asserted to violate the Federal Constitution, the name given to the statute is not conclusive, and it must be judged by its necessary effect, and if that is to violate the Constitution of the United States the law must be declared void." (Emphasis added.)

Ignoring the voluminous substantial evidence as shown in the affidavits,

Supreme Court of Alabama affirmed not following law as seen in the Bass v. South Trust Bank Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989).

See Petitt v. Penn, 180 So. 2d 66, (LA, 1966) which defines "due process of law",

"Due process of law" means that no person shall be deprived of life, liberty, property or any right granted him by statute, unless matter involved first shall have been adjudicated against him upon trial conducted according to established rules regulating judicial proceedings, and it forbids condemnation without a hearing."

The Federal courts have said that under the Fifth Amendment to United States Constitution rights incident to ownership cannot be divested by actions of the United States without due process of law. Northern Cheyenne

Tribe v. Northern Cheyenne, 505 F. 2d 268, (9th Cir. 1974). Also see Southwestern Petroleum Corp. v. Udall, 361 F. 2d 650 (10th Cir. 1966).

See Seibold v. Daniels, 337 F. Supp. 210 (U.S, Dist. Court, M.D. Ala., 1972), held,

"A state statute cannot be construed to obviate a constitutional requirement."

The Supreme Court of Alabama has failed to follow on law on the elements of summary judgment.

See Pruitt v. Elliott, 460 So. 2d 1275, (Ala. 1984), and Booth v. United Services Auto Association, 469 So. 2d 1281 (Ala. 1985).

CONCLUSION

For the above reasons, this Writ of Certiorari should be granted and a Merits Brief allowed to be written.

Clearly, the constitutional rights of Dr. Asam under the 5th and 14th amendments to

the U.S. Constitution were violated as to violation of her grandfather rights to practice law in her building which had been commercial and a multi-dwelling for over 50 years, when the City of Tuscaloosa was allowing a male to sell cars and trucks across the street with only a residential zoning [R3], and was not alowing her to practice law was SPOT ZONING and gender discrimination and violation of her grandfather rights [prior non-conforming uses]. Therefore, according to the record of this case, there was substantial evidence to show constitutional violations of equal protection, substantiive and procedural due process and grandfather rights of Dr. Asam, and these constitutional violations trigger the 42 U.S.C. §1983 claims. The instant case should be reversed and remanded with instructions to try by jury all triable issues.

Respectively submitted,

Julia Asam

Julia Asam, Attorney At Law

P.O. Box 591

Northport, Ala. 35476

205 333-1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above was sent by U.S.mail to Mr. Robert Ennis, City Attorney, City of Tuscaloosa, P.O. Box 2089, Tuscaloosa, Alabama 35403 and Mr. Booker Forte, Attorney At Law 607A 29th Ave., Tuscaloosa, Alabama 35401 this 14 day of September 1992.

Julia Asam

APPENDIX

ALABAMA COURT OF CIVIL APPEALS

October Term 1991-92

Case no. 2900304

Julia McCain Lampkin Asam

v.

City of Tuscaloosa, et al.

Appeal from Tuscaloosa Circuit Court

(CV-88-552)

THIGPEN, JUDGE

This is a zoning case.

Julia McCain Lampkin Asam owned certain rental property, which is zoned residential and located in a residential area of the City of Tuscaloosa (City). The building consisted of four apartment units. Asam, an attorney, filed a petition with the Zoning Board of Adjustment seeking a special exception for home office use and a variance to hire a secretary based on a claim of hardship being the need to care for her elderly mother. After publishing required notice and having a

hearing, the Board considered and denied the petition. Asam thereafter appealed to the circuit court for trial de novo. On appeal, Asam attempted to assert claims against the City involving alleged violatoins of her constitutional right to equal protection and claiming intentional discrimination, denial of equal protection, and denial of due process by the Board. The trial court granted the defendants' summary judgment as to claims against the City and at the conclusion of Asam's evidence at trial, granted a directed verdict in favor of the Board. Asam's motion for judgment notwithstanding the verdict was denied. Hence, this appeal.

The issues presented are: (1) whether the trial court erred in granting summary judgment against Asam in her claims of fraud and violation of her civil rights, and in her requests for rezoning, and (2) whether the trial court

properly granted a directed verdict denying Asam a home occupation special exception and a variance from this special exception to allow her to hire a secretary.

Initially we note that an appeal from a board of zoning adjustment is tried de novo at the trial level Ala. Code 1975, § 11-52-81; Board of Zoning Adjustment v. Warren, 366 So. 2d 1125 (Ala. 1979). The board of adjustment is limited to the authority set out in Ala. Code 1975 § 11-52-80(d):

> "The board of adjustment shall have the following powers:
>
> " (1) To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this article or of any ordinance adopted pursuant thereto;
>
> " (2) To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance; and

> " (3) To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice done."

On an appeal de novo under Ala. Code 1975, § 11-52-81, the trial court is limited to the powers given to the board of adjustment under Ala. Code 1975, §11-52-80(d); City of Homewood v. Caffee, 400 So. 2d 375 (Ala. 1981).

Asam contends that the trial court erred in granting summary judgment favorable to the defendants on the alleged fraud and the alleged civil rights violations, and in refusing to rezone her porperty. Ala. Code 1975, §11-52-80(d), however, does not allow the Board to hear these legal claims or to rezone.[1]

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[1]Note: Appellate court completely ignored that the rezoning was before the City Council of City.

Summary judgment is correctly granted when there is no issue of material fact present and the moving party is entitled to a judgment as a matter of law. J. Paul Jones Hospital v. Jackson, Coker, & Associates, 491 So. 2d 972 (Ala. Civ. App. 1986). As the trial court is legally barred from hearing legal claims or from authorizing rezoning,[2] there is no issue of fact which would preclude a summary judgment. Therefore, the trial court did not err in granting summary judgment on these claims.

Asam next contends that the trial court erred in granting a directed verdict for the defendants regarding her request for a special exception to practice law in the apartment as a "home occupation," and a variance from this special exception permitting her to hire a secretary. According to the Zoning Ordinance of the City of Tuscaloosa, §35-5(21), a home occupation is defined, in part, as:

2Again, the rezoning issue at the City Council was ignored which was a part of the lawsuit, and all constitutional issues were ignored.

"An occupation conducted in a dwelling unit, provided that:

" (a) No person other than members of the family residing on the premises shall be engaged in such occupation;

" (b) The use of the dwelling unit for the home occupation shall be clearly incidental and subordinate to its use for residential purposes by its occupants, and not more than 25 per cent of the floor area of the dwelling unit shall be used in the conduct of the home occupation; . . . "

Asam failed to qualify for a home occupation exception in that, according to her own testimony, she did not reside in the same unit in which she intended to practice law at the time of the trial. At a trial de novo under Ala. Code 1975 § 11-52-81, "The scope of of inquiry on appeal is the same as before the board of adjustment...'[3] Nelson v. Donaldson, 255 Ala. 76, 50 So. 2d 244 (1951)."

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[3]The appellate courts in the state ignored the constitutional rights of rezoning before the City Council of the City in this lawsuit.

Board of Zoning Adjustment v. Warren, 366 So. 2d 1125, 1128 (Ala. 1979) (Emphasis in original.) The appellant has the burden of proving again those issues placed before the Board.

Even though Asam may have lived in the apartment in question at the time of the hearing before the Board, she must prove that she was living there at the time of the hearing before the trial court as well. Therefore, there was no error on the part of the trial court in granting a directed verdict against Asam on this issue.

The city's definition of a home occupation precludes the employment of anyone except "members of the family residing on the premises." Therefore, Asam requested a variance from this provision to allow her to employ a secretary following her anticipated grant of a home occupation special exception. Because the trial

court properly denied the home occupation special exception, this question is moot. Even if Asam still desires to hire a secretary without this special exception, to grant a variance, the Board, or the trial court sitting as the Board, must hear evidence that "a literal enforcement of the provisions of the ordinance will result in unnecessary hardship." Ala. Code 1975 ; 11-52-80(d)(3). Asam's claim of a hardship was on the factual basis that her mother was ill and needed supervision. It is undisputed, however, that Asam's mother died before the trial court heard her requests for a variance. For such variance, Asam faced "the burden of proving again [her] need for the variance." Board of Zoning Adjustment, supra at 1127. Asam's hardship claim loacked a factual basis and her request for a variance was moot.

Asam stated a new hardship existed in that someone was making bomb threats and death

threats against her. This basis was not included in Asam's original claims before the board and is not allowed. See Caffee. The trial court therefore correctly refused to allow this testimony to be heard by the jury, and properly granted a directed verdict against Asam in her request for a variance.

Asam's final claim is that the trial court erred in refusing to consider her law practice as a continuation of the prior non-conforming use of the building as a rental office, and in denying her the right to change the prior non-conforming use from a rental office to a law practice. The trial court did not have the authority to hear these claims, because Asam did not follow the correct procedure for appeal.[4] Ala. Code 1975, § 11-52-80(d), grants power to the Board to do three things: (1) to hear appeals

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[4]This statement is incorrect since the appeal to the circuit court was timely and proper."

from the decisions of zoning officials, (2) to hear special exceptions, and (3) to authorize variances. In her application to the Board, Asam requested a special exception and a variance. If she alleged error in the zoning official denying her request based on prior non-conforming use of the property, her legal recourse was to request an interpretaton of the ruling by the full board of adjustment. Ala. Code 1975, § 11-52-80(d)(1).

Additionally, there is testimony that when Asam amended her petition to request rezoning and to request the Board to consider whether her prior non-conforming use of the building as a rental office would allow her law practice, this amended petition was filed untimely for it to be heard by the Board. A zoning officer testified that in order to publish notice of the petitions, a rule was established that any petitions or

materials thereon must be received by the Board at least fourteen days before the hearing. Asam presented no evidence that the requests in her amended petition fulfilled the public notice and "due notice to the parties in interest" requirements of Ala. Code 1975, §11-52-80(c).[5]

The Board, as authorized by Ala. Code 1975, § 11-52-80(b), adopted procedural rules which state that notice "shall be published one time in a newspaper of general circulation not less than (7) days in advance of the hearing date." This jurisdiction is silent on this point; however, notice is generally considered a jurisdictional prerequisite and a condition precedent to any valid action by the board. 101A C.J.S. Zoning and Land Planning § 188 (1979). The

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[5]This statement is incorrect since the amendment was timely filed, but the City failed to make a timely affirmative defense of an administrative rule, and the grandfather issue was timely.

amended petition was not timely received for compliance with the notice requirement, and could not be heard by the Board.[6]

The Zoning Ordinance of the City of Tuscaloosa, § 35-115 (c), provides that the Board may, as a special exception, substitute one non-conforming use with another non-conforming use, upon a finding that the proposed use is "equally appropriate." In her testimony, Asam admitted that she was unaware of this provision when her petition was before the board. As the issue was never properly before the board, it could not be raised before the

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[6]This is a false statement since the grandfather issue was before the board. See transcript of the hearing in record [details will be in Merits Brief if allowed]; amended petition was timely.

trial court on a trial de novo.[7] Caffee. We therefore find no error in the trial court's denial of Asam's request to substitute a law office for a rental office.

In reviewing the evidence in a light most favorable to Asam's position, we cannot say that the trial court erred in granting a directed verdict in favor of the defendants on the issues remaining after the partial summary judgment was granted. See Ex parte Hicks, 537 So. 2d 486 (Ala. 1988).

Accordingly, the judgment appealed from is affirmed.

AFFIRMED.

Robertson, P.J., and Russell, J. concur.

21st day of February 1992.

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[7]The grandfather issue was before the lower court timely, and how the City was suppose to handle it was not necessary for Dr. Asam to know at the time of the petition. The point is that City the last minute tried to use procedural rules on

APPENDIX B

COURT OF THE COURT OF CIVIL APPEALS

STATE OF ALABAMA

CV 88-552

CIV 2900304

March 20, 1992

Julia McCain Lampkin Asam

Appellant

v.

City of Tuscaloosa, et al.

Appellee

"Applicatoin for rehearing overruled. No opinion written on rehearing."

John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

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7 (Continued)

the administrative level when not filed as affirmative defenses, and violated Dr. Asam's constiutional rights, including the grandfather rights.

APPENDIX C

SUPREME COURT OF ALABAMA

Case # 1911039

June 19, 1992

Petition for Writ of Certiorari denied. NO Opinion.

Robert G. Esdale, Clerk

Supreme Court of Alabama

APPENDIX D

SUPREME COURT OF ALABAMA

September 10, 1992

#1911039

Ex parte Julia McCain Lampkin Asam

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(Re: Julia McCain Lampkin Asam v. City of Tuscaloosa, et al.

(CIV 2900304 (Tuscaloosa CV 88-552))

"IT IS ORDERED that the application for rehearing filed in this cause on June 29, 1992, and the same is hereby, stricken in accordance with provisions of Rule 39(j), Alabama Rules of Appellate Procedure. NO COSTS TAXED.

Robert G. Esdale, Clerk

Supreme Court of Alabama